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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 13

DOYLE SMITH, *Petitioner*

v.

EVENING NEWS ASSOCIATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

The court below held that the subject matter of this suit is within the exclusive jurisdiction of the National Labor Relations Board, because the conduct alleged in the complaint as a violation of the collective bargaining agreement would also be an unfair labor practice under the National Labor Relations Act. The court relied primarily on this Court's decision in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and it rejected petitioner's argument that the preemptive doctrine of such cases as *Garmon* is not applicable to suits for violation of collective bargaining agreements. (R. 26-36.)

Petitioner's opening Brief, and the Brief *Amicus* for the United States, discussed only the issue dealt with by the court below, *viz.*, whether the *Garmon* preemption principles, and the considerations which underlie them, apply to judicial enforcement of collective bargaining agreements.

Respondent's Brief, however, discusses this question only

secondarily:[1] it principally undertakes to support the decision below by an entirely new line of argument.

Respondent's new chain of argument, as we understand it, is comprised of the following links: (1) *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 210 F. 2d 623 (6th Cir.), *aff'd*, 348 U.S. 437, holds that the "uniquely personal right of an employee" to wages may be enforced only in a suit by the individual employee, and not in a suit by the union under § 301(a). (2) The *Westinghouse* decision is still good law. (3) This is a suit on such a "uniquely personal right" of employees, and hence suit could not have been brought by the union under § 301(a). (4) Federal substantive law governs only as to suits on collective bargaining agreements which are or could have been brought by a union under § 301(a), that is, to suits within the jurisdictional purview of § 301(a). State substantive law governs as to a suit brought by individual employees on the "uniquely personal right of an employee" to wages, whether the suit be brought in a state court or in a federal court under diversity jurisdiction. (5) Since this Court cannot review state substantive law, the preemption doctrine of *Garmon* must be applied in suits on the personal rights of employees, in order to prevent "diversities and conflicts," even though the *Garmon* doctrine is not applicable to breach of contract suits within the jurisdictional reach of § 301(a).

Although this line of argumentation was not made to or considered by the court below, we take it that it may be urged here under the doctrine that a decision may be supported, though not attacked, on a ground not raised below.

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[1] Respondent discusses this issue in part C of its Brief, pp. 35-50, but does not as respects this issue raise any points not anticipated in our opening Brief. The preemption issue is fully discussed, and the case for preemption strongly argued, in Christensen, *Arbitration, Section 301, and the National Labor Relations Act*, 37 N.Y.U.L. Rev. 411 (1962).

[2] We think it inapt, however, for respondent to complain (Br.

However, while we are awed by the ingenuity of counsel for respondent, we think that their chain of reasoning does not hang together. While their final contention (i.e., (5) above) might well be accepted if the preceding contentions on which it rests were sound, we think that all of those contentions are questionable and that some of them are wholly specious.

Instead of jumbling these contentions all together as respondent does, we will consider them one at a time. It is to be kept in mind that the whole chain breaks if any link is unsound.[3]

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p. 6) that our opening Brief and the government's Brief *Amicus* did not discuss these newly devised contentions.

[3] Respondent also argues (Br. pp. 20-25) that only a union, and not individual employees, may sue or be sued under § 301(a). However, this contention does not appear to be relevant even to respondent's line of argument; since according to respondent the reach of the federal substantive common law of collective bargaining depends on whether suit on the alleged contract violation in question could, as a matter of federal jurisdiction, have been brought under § 301(a), rather than upon whether the party asserting the claim would have had standing to sue under § 301(a).

Thus, as we understand respondent's position, it contends that state substantive law would control in the present case, because it involves the "uniquely personal right of an employee" to wages, even if the suit had been brought in the name of the union.

Accordingly, and since respondent's line of argument contains so many patent and fatal weaknesses, we have not addressed ourselves to the question whether individual employees may sue or be sued under § 301(a). However, we wish to call it to the Court's attention that *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, may hold adversely to respondent's contention on this point.

We have argued *infra* pp. 10-11, that *Atkinson* holds, in disposing of Count II of the complaint, which rested federal jurisdiction upon diversity of citizenship, that the reach of the federal substantive common law of collective bargaining is not limited by the jurisdictional reach of § 301(a). The opinion can be read, however, as holding, either alternatively or additionally, that Count II falls within federal jurisdiction under § 301(a). See 370 U.S. at 238, and especially note 6. On any reading the decision seems fatal to respondent's position.

1. *The holding of Westinghouse.* Respondent's argument rests initially on the proposition that in *Westinghouse* this Court held that the "uniquely personal right of an employee" (348 U.S. at 461) to wages may be enforced only in a suit by the individual employee, and not in a suit by the union.

There was no opinion of the Court in *Westinghouse*, and the justices making up the majority voted for affirmance on varying grounds. Thus, of the six justices comprising the majority, three (opinion of Justice Frankfurter, in which Justices Burton and Minton concurred) voted to affirm on the ground that, in order to avoid constitutional and other difficulties, § 301 (a) should be construed as not conferring jurisdiction on the federal courts over suits to recover wages allegedly due individual employees. These justices in effect held that § 301 (a) did not confer jurisdiction over the subject matter of the action. They did not say that only the employees, and not the union, could sue for wages under a collective bargaining agreement. Quite the contrary, the opinion by Justice Frankfurter expressed the view that (in an appropriate tribunal) "either or both" may sue.[1] The dissenting opinion of Justice Douglas, concurred in by Justice Black, likewise expressed the view that the union could enforce the claim. He declared (348 U.S. at 465–466):

> "We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving

[1] The Justice said (348 U.S. at 459):

"• • • To hold that the union may sue, it is not necessary to hold that the employee may not sue in any forum, and vice versa. At least when the union and the employee are in agreement, there is no reason why either or both should not be permitted to sue. • • • When the employee and the union are in disagreement, the question is not which may sue, but rather the extent to which the one may conclude the other."

the construction and enforcement of the collective bargaining agreement."

Thus of the eight justices participating, five were of the view that the union could enforce the claim in an appropriate tribunal, though three of them thought the federal courts not an appropriate tribunal. Three other justices did express the view that only the employees, and not the union, could sue to enforce the wage provisions of a collective bargaining agreement. (See opinion of Warren, C. J., concurred in by Clark, J., and opinion of Reed, J.) But this was never the view of more than a minority of the Court.

2. *Present status of Westinghouse.* A majority of the justices in *Westinghouse* (i.e., Justices Frankfurter, Burton, Minton, Warren and Clark) did hold that § 301 (a) should not be construed as conferring jurisdiction on the federal courts over a suit to enforce the wage provisions of a collective bargaining agreement. This restrictive interpretation of § 301 (a) largely stemmed from the reluctance of these justices to have the federal courts undertake "to work out without more a federal code governing collective bargaining contracts." (Opinion of Frankfurter, J., 348 U.S. at 454.)

This reluctance began to crumble away with *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448. Only Justice Frankfurter, dissenting, continued to protest against (353 U.S. at 465–466):

"The paradox of the *Westinghouse* decision is that although the action was dismissed for want of jurisdiction partly by the votes of Justices who deemed the right to sue "uniquely personal," the only point of law which commanded the assent of a majority was that the collective bargaining representative may sue in a proper forum if the employer fails to compensate his employees according to the collective agreement." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 603 (1956).

> "* * * the Court's attribution to § 301 of a direction to the federal courts to fashion, out of bits and pieces elsewhere to be gathered, a federal common law of labor contracts * * *."

In *United Steelworkers* v. *Warrior & Gulf N. Co.*, 363 U.S. 574, and companion cases, all of the members of the Court were agreed that substantive federal law controls as to the interpretation and enforcement of the arbitration provisions of collective bargaining agreements.

These decisions quite clearly undercut the rationale of *Westinghouse*. If, however, there remained any doubt that *Westinghouse* had been relegated to the dust bin of history, that doubt was removed by *Dowd Box Co.* v. *Courtney*, 368 U.S. 502. In that case suit was brought in a state court in Massachusetts by local union officers as representatives of the membership of the local. The union contended that certain negotiations with the company had eventuated in a legally binding collective bargaining agreement, while the company contended that its negotiators had acted without authority. The complaint asked for an order declaring the contract valid, and for a money judgment in conformity with the wage provisions of the agreement; and a final decree was entered awarding specific sums to named employees in the amounts which would have been paid them by the company if it had complied with the contract. (Record 93, 103.) [6]

Both in the Massachusetts courts and here the company argued that the suit was within the jurisdiction of the federal courts under § 301, and that the state courts therefore

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[6] The Company's brief in this Court states (p. 9) that "the final decree awarded only monetary damages," the other issues having become moot due to lapse of time.

had no jurisdiction over the controversy. This Court agreed that the suit was within the purview of § 301, but held that the state courts nevertheless had concurrent jurisdiction. In answer to the contention that diversities and conflicts would result from concurrent state court jurisdiction, this Court pointed out that "federal common law" would control, and declared (368 U.S. at 514):

> "* * * To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court."

It is thus quite clear that the present suit is within the jurisdictional purview of § 301, and that it is controlled by substantive federal law. The entire structure of respondent's argument thus collapses, even assuming, arguendo, the validity of respondent's further contentions that federal substantive law governs only as to suits which are or could be brought under § 301, and that as to suits not within the jurisdictional reach of § 301 the preemption principles of *Garmon* should therefore be applied in order

In *Board Box* the company also made an argument very like that advanced by respondent here. The company pointed out that the conduct charged to it constituted an unfair labor practice, i.e., a refusal to bargain; and it argued that, while there is an exception as to cases brought under § 301 to the preemption principles which would otherwise apply, this exception should not extend to suits brought in state courts. (Brief pp. 7, 21-26.) This Court did not advert to this argument.

After reviewing the decisions discussed above, Professor Summers concludes:

> "There may remain a thin shadow of possibility that such a suit could not be brought in the federal courts, but it now seems plain that union actions to enforce, either directly or through arbitration, terms of the collective agreement which are peculiarly for the benefit of the individual employee such as wages, seniority or discharge are governed by federal substantive law."

Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 372 (1962).

We agree as to the substantive, but fail to perceive the shadow.

to avoid diversities and conflicts which the Court would be powerless to resolve.

3. *Nature of the right asserted in this suit.* Even if respondent was correct in its contention as to what *Westinghouse* held, and even if that holding was still good law, the right here sought to be enforced is not "uniquely personal" to individual employees in the same sense as the right to be paid the agreed upon wages. The contractual provision against discrimination on account of membership or activity in the Guild is as much for the protection of the union as of individual employees. This provision, like many others in a collective bargaining agreement, has what Professor Cox called a "double aspect."[9] He analyzed it thus:

> "• • • An employer's promise not to discriminate against employees because of union activities belongs in the category of obligations benefiting the union as an organization, but the individual would seem to have the same kind of interest which he has in the ordinary obligation not to discharge without just cause." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 617, n. 24 (1956).[10]

Hence the claim here sued on might well be regarded as within the jurisdictional purview of § 301 even if respondent's contention as to *Westinghouse* were accepted.

4. *Reach of the federal common law.* Respondent argues that "the application of federal substantive law should be coextensive with the jurisdictional grant of § 301(a), and

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[9] That so many of the provisions of a collective bargaining agreement do have this double aspect is one of the reasons why the decision of the Court of Appeals in *Westinghouse* was practically untenable.

[10] Professor Meltzer similarly classifies a provision against discrimination for union activities as involving "a coalescence of individual and collective interests." Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 Col. L. Rev. 269, 272 (1959).

no more," (Br. p. 31). Even in a diversity case, respondent urges, state law must control, pursuant to *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, (unless § 301(a) jurisdiction could have been invoked). (Br. p. 34.)

This issue as to the scope of the federal common law becomes pertinent to the disposition of the case only upon acceptance of respondent's preliminary contentions, discussed above. We therefore doubt that the Court will find it necessary to consider whether the federal substantive law of collective bargaining extends beyond the jurisdictional reach of § 301(a).

It is our view, however, that the federal common law on collective bargaining does extend beyond the jurisdictional reach of § 301(a); and that it encompasses all issues as to the negotiation, interpretation, and enforcement of collective bargaining contracts, including issues which do not involve the "violation" of collective agreements, or are otherwise not within the jurisdictional range of § 301(a).

This broad reach of federal substantive law results, as a matter of legal theory, from the fact that the substantive body of federal common law on collective bargaining does not derive simply (or at all, except by implication) from § 301(a), but from other provisions of the Labor Management Relations Act, as amended, from the Railway Labor Act, and from various other sources. As this Court put it in *Lincoln Mills*, 353 U.S. 448, 456, the courts are to look to "the policy of our national labor laws."[11] While § 301(a) provided the most significant stimulus to the development of a body of federal common law on collective bargaining, some federal common law on that subject antedated the enactment of § 301. See, *e.g. Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192. We see no basis on which the reach of this

[11] See, generally, Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements*, 37 N.Y.U.L. Rev. 448 (1962).

law could be held to be limited to the jurisdictional range of § 301(a). See also *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232; *Sayres* v. *Oil Workers, Local 23*, 350 U.S. 892 (mem.); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330.

Further, in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 the Court explicitly rejected the contention that federal law controls only in suits within the jurisdictional reach of § 301 (a), and not in diversity cases. There the company sued for alleged breaches of the no-strike clause of a collective bargaining agreement. Count I undertook to state a cause of action against the international and local unions, and rested federal jurisdiction on § 301 (a). Count II undertook to state a cause of action against 24 individual employees, and rested federal jurisdiction on diversity. The Court of Appeals held that "Count II stated a cause of action cognizable in the courts of Indiana, and, by diversity, maintainable in the District Court."

This Court reversed. It said (370 U.S. at 245-246):

> "We are unable to agree with the Court of Appeals, for we are convinced that Count II is controlled by federal law and that it must be dismissed on the merits for failure to state a claim upon which relief can be granted.
>
> "Under § 301 a suit for violation of the collective bargaining contract in either a federal or state court is governed by federal law * * * and Count II on its in Count II is therefore within the scope of a 'violation of the no-strike clause * * *. The conduct charged in Count II is therefore within the scope of a 'violation' of the collective agreement."

Thus the substantive federal common law created by the Court in response to the jurisdictional grant of § 301 (a) applies to all issues as to violation of a collective bargain-

ing agreement, whether or not the suit could be brought in the federal courts under § 301 (a).[12]

The principle for which respondent contends would be utterly unworkable. To examine its practical consequences is to refute its validity.

According to respondent, rights running to or claims against a union as an entity under a collective bargaining agreement, including all suits by or against a union to enforce arbitration awards or the arbitration provisions of a contract, are within the purview, jurisdictionally, of 301 (a), and are therefore controlled by federal substantive law, whether suit is brought in state or federal court; but claims "uniquely personal" to the employees (unless asserted by the union via arbitration) are controlled by state law.[13]

Respondent's analysis would, if accepted, give rise to the following problems and difficulties:

(1) Uniform federal law would prevail as to rights running to or against a union, but rights personal to employees would be subject to the vagaries of state law.[14] States would even be free to adopt the conservative view of the Privy Council or the radical view of the late Dean Shulman that collective bargaining agreements should be treated

[12] A possible alternative or additional interpretation of *Atkinson*, but one equally fatal to respondent's overall position, is discussed in note 8 *supra*.

[13] Respondent declares (Br. p. 8) that "Congress had quite definite intentions" to this effect. As Justice Frankfurter said of a similar contention in *Westinghouse*, 348 U.S. at 456, "This is an excessively sophisticated attribution to Congress."

[14] As to the wide range of views of the state courts, see Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 363-368 (1962).

as mere moral obligations, not legally enforceable in the courts.[14] Such a result would be absurd:

> "The substantive law applied * * * should be the same regardless who is the nominal plaintiff. The test of the validity of the provision, the rules of interpretation, and the considerations brought to bear in resolving ambiguities ought not be different because the individual rather than the union brings the suit."[15]

(2) Federal doctrine would nevertheless impinge, however, even as to rights personal to employees, if the case involved issues arguably subject to the jurisdiction of the NLRB, for in that event the preemption doctrine of *Garmon* would come into play. A substantial percentage of cases would, as shown in our main Brief, p. 25 *ff.*, present preemption issues.

(3) The court would have to decide in each case whether the right asserted runs to the employee or to the union. As Justice Frankfurter pointed out in *Westinghouse* (348 U.S. at 456–458), these determinations involve considerable difficulty. The state courts are not even in agreement on whether an individual employee may sue for discharge in alleged violation of a collective bargaining agreement.[16] Under respondent's theory each state court determination as to whether a right under a collective agreement runs to the union or to the employees individually would presumably present a federal question subject to review by this Court.

(4) Respondent does not discuss the problem of suits on rights having what Professor Cox calls a "double aspect,"

[14] See *Young* v. *Canadian Northern Ry. Co.*, [1931] A.C. 83; Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955).

[15] Summers, *op. cit. supra* at 373.

[16] See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 646-647 (1956); Summers, *op. cit. supra*, at 372.

that is rights running both to the union as an entity and to the employees personally. (The contract clause here sued on is a prime example. Professor Cox suggests provisions giving top seniority to union officials as another.[7]) A suit by a union to enforce such a right would, however, be within the jurisdictional reach of § 301 (a), and hence would seem to be controlled by substantive federal law, even according to respondent. Whether respondent asserts that a suit on such a right by individual employees would be controlled by state substantive law, we do not know. If so, the forum shopping which existed under *Swift* v. *Tyson*, 16 Pet. 1, would be revived.[8]

(5) As far as we can make out, respondent does not commit itself as to whether federal or state law controls as to claims against employees personally. (We have argued, *supra* pp. 10-11, that *Atkinson* v. *Sinclair Refining Co.* holds that federal law controls, and that this holding rejects petitioner's contention.) However, if respondent's contention were accepted it would logically follow that state law would control. Hence the problems and difficulties heretofore and hereafter mentioned would arise equally in the case of claims against employees personally.

(6) Respondent concedes that federal substantive law controls in suits with respect to agreements to arbitrate or

[7] Cox, *op. cit. supra*, p. 617, n. 21.

[8] *Board Bar* suggests a related problem. As stated *supra* p. 6, at the outset that suit involved both what respondent would presumably characterize as a claim enforceable by the union as an entity, i.e., the claim that the contract as a whole was legally binding, and what respondent would characterize as claims enforceable by the employees individually, i.e., for the wage increases provided for by the contract. By the time the final decree was entered, however, the first aspect of the case had become moot, and the decree simply awarded money damages in specific amounts to named individuals. According to respondent's theory, presumably the case started out controlled by federal law, and ended up controlled by state law.

arbitration awards, because such suits could be brought by a union under § 301(a). (Br. pp. 8, 48.) Thus, according to respondent, if enforcement of an employee's wage claim is sought via arbitration federal substantive law controls (and NLRB jurisdiction need not be deferred to), while if enforcement is sought via a state court suit or a federal diversity suit, state substantive law controls (and NLRB jurisdiction must be deferred to.)

Thus for numerous practical as well as theoretical reasons we submit that federal substantive common law must (absent federal statutory law) control as to all issues with respect to collective bargaining in both federal and state courts. These issues must perforce include not only those involving interpretation or enforcement of collective bargaining agreements, but such questions as the duty of the union fairly to represent all employees in the unit, the power of the union to settle a dispute with the employer without the acquiesence of the employee, whether employees have individual contractual rights which they may enforce independently of or in opposition to the union, etc., etc. We see no room for the intrusion of state substantive law on any of these issues, save as a source of federal law.

As respects procedural matters, we take it that federal law controls in the federal courts and state law in the state courts. More precisely, state law prevails in the state courts on procedural matters, except as it may be overridden by controlling federal substantive law.

For example, state law must of necessity still control in the state courts as to whether a union may sue or be sued as an entity in the name of the union, or in a class suit as in *Dowd Box*. While § 301 (b) provides that a union may sue or be sued as an entity in the federal courts, Congress has not undertaken, if it could, to lay down such a rule for the state courts.

Accordingly state law controls on whether individual employees (or, as here, their assignee) may sue in the state courts to enforce rights under a collective bargaining agreement, insofar as the question is, as here, merely procedural. Conceivably the respondent might have urged a number of substantive defenses which would have cut across this procedural question, but it did not. For example, respondent might have urged that the rights sued on ran exclusively to the union and not to the individual employees, so that suit must be brought in the name of the union as the real party in interest.[1] Had respondent raised such a defense it would have, we think, presented an issue of federal substantive law.[2] Actually respondent takes just the opposite position, *viz.*, that the rights sued on run only to the employees, and are enforceable only by them.

[1] There is wide disagreement among commentators and courts on whether only the union has standing to sue on a collective bargaining agreement, or whether employees may also sue, and, if so, in what circumstances and on what grounds. See, *e.g.*, Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362 (1962); Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 Cornell L. Q. 25 (1959); Howlett, *Contract Rights of the Individual Employee as Against the Employer*, 8 Lab. L. J. 316 (1957); Cox, *Individual Enforcement of Collective Bargaining Agreements*, 8 Lab. L. J. 850 (1957).

[2] Professor Summers concludes that the issue is one of federal law. See *op. cit. supra* at 370-375. The lower courts have in general ignored the question whether state or federal law controls, with the result that both state and federal courts have usually assumed that state law controls. See Summers, pp. 370-371. Most of these decisions of course antedate *Lincoln Mills*. However in *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2d Cir.), *affirmed on another ground*, 370 U.S. 530, the Court of Appeals treated state law as controlling both as to the standing of the individual employees to sue and as to the interpretation of the contract. Judge Lumbard dissenting, pointed out that federal substantive law should control. 288 F. 2d 105. Contra, and treating the substantive issue as one of federal law, see *Giordano v. Mack Trucks*, 203 F. Supp. 905 (N.J. 1962).

Respondent must, however, recognize that the issue whether the rights are enforceable by the union, by the employees, or by both, is one of federal law, since respondent rests its position (though erroneously, as we think) on the *Westinghouse* case.

Again, respondent might have urged (assuming the facts to support such a defense) that the union and respondent had entered into a binding settlement of the claims sued on;[22] or that the suit should be stayed pending arbitration, or dismissed because of the union's failure to take the case to arbitration,[23] or because the union had refused to arbitrate. The sufficiency of any of these substantive defenses would, we submit, have been controlled by federal law. See, *e.g.*, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Giordano* v. *Mack Trucks*, 203 F. Supp. 905 (N.J. 1962). That is the conclusion reached by Professor Summers, after exhaustive review of the subject. He states (*op. cit. supra* n. 20, at 374):

> "The rights of individuals, both their right to standing and their substantive rights, must be governed by federal substantive law.
>
> "This result, which requires a comprehensive and exclusive body of federal law governing all relationships within the collective agreement, is a nearly inevitable consequence of the Court's decision in *Lincoln Mills*. The collective agreement creates a complex of relationships between the employer, the union, and the employee. It is designed to benefit and govern all of the parties as a functioning institution. A coherent and appropriate body of law can not be fashioned by pulling threads from the fabric and treating them with multicolored state law."

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[22] Rejecting such a defense, see *Pattenge* v. *Wagner Iron Works*, 275 Wisc. 495, 82 N.W. 2d 172 (1957).

[23] Sustaining such a defense, see *Parker* v. *Borock*, 5 N.Y. 2d 156, 156 N.E. 2d 297, 182 N.Y.S. 2d 577 (1959).

CONCLUSION

Respondent argues that cases of this sort are controlled by state substantive law, unreviewable by this Court; and that when, as here, the case involves an issue within the jurisdiction of the NLRB, the preemption doctrine of *Garmon* must be applied to forestall possible "diversities and conflicts."

We would agree that *Garmon* should be applied if we agreed that state substantive law controls, but we do not. For the reasons set forth above, we submit that federal, and not state, substantive law is applicable, and that there is, therefore, no basis for differentiating the present case from *Dowd Box* and *Lucas Flour*, in which it was held that the preemption doctrine of *Garmon* is not applicable to suits for the violation of collective bargaining agreements.

For the reasons stated, it is respectfully urged that the judgment of the court below should be reversed.

Respectfully submitted,

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